Petition

81-856

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No.

MICHAEL DELNO SCHRIEVER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Fifth Circuit
and
the United States District Court
for the Northern District of
Florida, Pensacola Division

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QUESTIONS PRESENTED

ISSUE I

Was Petitioner, the criminal defendant, denied his Fifth Amendment right to due process and his Sixth Amendment right to a fair trial by jury when the trial judge, over objection and in response to the jury's question during its deliberation, informed the jury that Petitioner had possession of three critical pieces of evidence against him, thereby removing this factual issue from their deliberations?

ISSUE II

Was Petitioner denied his Fifth Amendment protection against self-incrimination and right to due process by the trial court's refusal to suppress Petitioner's self-incriminating statement and writings obtained from Petitioner in response to interrogation by police officials when Defendant was within their custody but prior to his having been given any Miranda type warning?

ISSUE III

Does the Fifth Amendment or 18 USC 3501 require that an accused be informed of the nature of the offense of which he is suspected prior to custodial interrogation as a prerequisite to a determination that his subsequent self-incriminating statement was made voluntarily, where the accused is not taken into custody at the scene of or during the course of the suspected offense or under other circumstances indicating that he is aware of the nature of the offense of which he is suspected?

REPORTS OF OPINIONS AND DECISIONS BELOW

The adjudication of Petitioner's guilt on both counts by The United States District Court, Northern District of Florida, the Affirmance of same by The United States Court of Appeals for the Fifth Circuit and the Denial of a Petition for Rehearing and Suggestion for Rehearing En Banc by said appellate court were not reported.

GROUNDS FOR JURISDICTION

Petitioner was adjudged guilty by The United States District Court for The Northern District of Florida, Pensacola Division, on November 1, 1980. A timely appeal was filed to The United States Court of Appeals for the Fifth Circuit, which court affirmed the convictions by Order dated July 8, 1981. (A-1) A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Order dated September 10, 1981. (A-2)

Jurisdiction is conferred on this Court by 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved:

Constitution of the United States, Amendment V & VI; 18 USC §3501.

These provisions are lengthy and are set forth in the Appendix at pages A3-A6.

STATEMENT OF THE CASE

Michael Schriever was arrested on June 25, 1980, by agents of the Okaloosa County Sheriff's Department and by indictment filed June 26, 1980, in The United States District Court for the Northern District of Florida, was charged under count one with conspiracy to possess cocaine and with intent to distribute. A superseding indictment was filed on August 14, 1980, charging Schriever under count one with an identical count of conspiracy to possess cocaine with intent to distribute and, additionally, under count three charging Schriever with possession of the cocaine which was the subject of the conspiracy, violations of 21 USC §846 and 21 USC §841(a)(1) respectively. Schriever filed a motion to suppress. That motion was denied.

The trial commenced on October 27, 1980, and a verdict of guilty to both counts was returned by the jury on November 1, 1980.* Subsequently, the court denied Schriever's motion for judgment of acquittal, for new trial, and his motion for post conviction release. A timely appeal and petition for rehearing were pursued but denied as noted, supra.

Factual references are to the Record on Appeal and will be designated by the letter "R" followed by the volume number and page number to which reference is made.

On June 25, 1980, a "controlled buy" of cocaine from Defendant, Tom Williams, was made in a room on the third floor

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* The trial also involved Schriever's co-defendant and alleged co-conspirator, Thomas Nelson Williams.

of the Hawaiki Motel in Destin, Florida, by agents of the Drug Enforcement Agency, the Okaloosa County Sheriff's Department and the Escambia County Sheriff's Department. After Williams had been arrested, Deputy James Lowman of the Escambia County Sheriff's Department went downstairs and saw Appellant, Michael Schriever, sitting on a sofa in the lobby. (R-5-291) The agents had been informed that Williams would be by himself and had no reason to suspect the involvement of any other person (R-4-189, 247, 248) Lowman, however, returned to the third floor and advised D.E.A. agent Renton that he had seen Mike Schriever in the lobby and both agents returned to the lobby where Schriever still remained and identified themselves to him as law enforcement agents. (R-5-292, 293, 304, 317) The agents escorted Schriever to Room 302 of the motel, where several agents were assembled. Schriever was patted down while in the elevator on the way up to the third floor. Renton testified that he had reason to believe, from the time he approached Appellant in the lobby, that he was involved with Williams (R-5-304)

The government stipulated that Miranda warnings were not given at this time. (R-5-300) Agent Renton asked Schriever if he knew Williams and Schriever said he did. Renton then asked Schriever if he had any cocaine on his person. In answer, Schriever stood and emptied his pockets and the contents of a pouch he was carrying onto a table. (R-3-1st transcript-33, 34; R-5-295) Agent Renton testified that the items taken from Schriever's pockets were an Okaloosa County Airport parking

receipt, a torn piece of paper with calculations on it, and an orange notebook with various notations in it. Each of these items was put into evidence by the government and was essential to the evidence of a conspiracy between the co-defendants.

The parking receipt was important in that co-defendant, Williams, had informed agent Renton that the illegal drugs would arrive at the Okaloosa County Airport. The notebook was material in that agent Renton testified that it contained notations which in his opinion related to transactions dealing in the sale of narcotics. The torn piece of paper was most important in that it allegedly matched up with a piece of paper in the possession of Williams at his arrest, which referred to the sale between Williams and agent Renton.

Renton testified that had Schriever attempted to leave, he would have been arrested. (R-3-1st transcript-39) Schriever testified that there were six or seven officers present in the room at the time and that he felt compelled to display his personal effects. (R-3-1st transcript-46, 47)

Thereafter, Miranda warnings were given to Schriever but they did not contain any advice as to the nature of the offense which he was suspected to have committed. (R-5-306, 307) Agent William Warner, Renton's supervisor in the Drug Enforcement Agency, admitted that this was contrary to both the policy and custom of all agents in the Drug Enforcement Agency to advise a suspect of the nature of the offense with which he is suspected. (R-6-581, 482, 587)

After being advised of his rights as printed on Renton's card, Schriever indicated that he had just had a beer with Williams. (R-5-305) This directly conflicted with the testimony of Williams.

Over objection, the court ruled that Schriever's statement was voluntarily given and, therefore, admissible. (R-5-312, 315) Again over objection, the court permitted the articles taken from Defendant Schriever at the time he emptied his pockets and pouch to be entered into evidence. (R-5-347)

No drugs were found on Schriever. He did not attempt to flee and was cooperative throughout his interrogation, detention and arrest. (R-6-622, 623) Schriever did not testify at the trial.

Prior to trial, the court had ruled that an objection by one defense attorney would suffice as an objection for both defendants unless the non-speaking attorney rose to disassociate himself from the objection. (R-4-65)

During the course of its deliberations, the jury sent a note to the trial judge asking, "Which defendant had possession, orange notebook and Exhibits 21 and 22?" Over objection, the court sent a written answer back to the jury stating, "Defendant Schriever had possession of this notebook and exhibits 21 and 22". (R-6-902, 903, 904)

ARGUMENT

ISSUE I

The trial court, in response to the jury's question during its deliberations and despite objections by counsel for both defendants, sent the following written answer to the jury: "Defendant Schriever had possession both this notebook and Exhibits 21 and 22." As noted, each of these items was critical to the circumstantial proof of conspiracy against Schriever. Obviously, agent Renton's testimony regarding their source likewise was crucial.

The critical point is that the trial court did not merely inform the jury of the contents of the agent's testimony but rather stated as a matter of fact that Schriever was the possessor. The jury thereafter did not need to evaluate agent Renton's credibility.

Petitioner, of course, does not assert that a federal judge does not have the discretion to comment on the evidence and the further discretion to have testimony re-read to a jury or transcribed and made available to them at the jury's request and after it has begun its deliberations. Nonetheless, it is incumbent on the trial judge to exercise extreme care in re-opening the case for the introduction of further testimony or in permitting any evidence to be restated or re-read to the jurors. See Travelers Indemnity Company v. Pray, 204 F.2d 821 (6th Cir. 1953). Furthermore, the judge "may express his

opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." Quercia v. United States, 289 U.S. 466, 469; 53 S.Ct. 698, 699.

In United States v. Bates, 407 F.2d 590 (7th Cir. 1969) held that the trial court committed reversible error when it permitted the jury to read a stipulation during the course of its deliberations. This stipulation had been entered into by all parties, stated what would have been the testimony of four witnesses who were then excused from appearing at the trial, and was read into the record at the outset of the trial. The Seventh Circuit Court of Appeals reversed because the stipulation did not constitute a recitation of undisputed facts since the issues to which the stipulation related were in controversy.

Petitioner submits that the trial court's actions below were much more egregious error and, in fact, deprived him of his right to have the jury determine all issues of fact including the determination of who had possession of the incriminating evidence including the orange notebook and Exhibits 21 and 22.

Although Petitioner did not testify and deny possession of the incriminating evidence, nonetheless, the jury was not bound to accept as true the testimony of agent Renton. This Court addressed that exact issue in Hawk v. Olson, 326 U.S. 271, 279; 66 S.Ct. 116, 120, when it stated:

> "This, of course, does not mean that uncontradicted evidence of a witness must be accepted as true on the hearing. Credibility is for the trier of facts."

The credibility of agent Renton's testimony was a matter for determination by the jury despite the absence of contradictory evidence. See also Farmer v. Caldwell, 476 F.2d 22 (5th Cir. 1973), Goins v. Brierley, 464 F.2d 947 (3rd Cir. 1972).

United States Courts of Appeal have consistently recognized that all issues of fact, even of undisputed fact, must be left to the determination of the jury. The First Circuit Court of Appeals in DeCecco v. United States, 338 F.2d 797 (1st Cir. 1964) stated:

> "No matter how persuasive the Government's evidence may seem to the Court, there is no burden on a Defendant to dispute it. Nor can Defendant's failure to offer evidence on one issue change or satisfy the Government's burden with respect to it." 338 F.2d at 798.

That basic rule was stated differently in United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971):

> "The effect of the trial judge's comments was to direct a verdit on these fact issues. See e.g., Brooks v. United States, 5 Cir. 1957, 240 F.2d 905, 906.
>
> [N]o fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system, the Trial Court may never instruct a verdict either in whole or in part.
>
> Roe v. United States, 5 Cir. 1961, 287 F.2d 435, 440 (footnote omitted), cert. denied, 368 U.S. 824, 82 S.Ct. 43, 7 L.Ed.2d 29. No matter how conclusive the evidence, any such instruction amounts to plain error." (citations ommitted) 444 F.2d at 762.

The Trial Court's determination below of a material issue of fact is tantamount to the partial direction of a

guilty verdict, as stated in United States v. Lee, 483 F.2d 959 (5th Cir. 1973);

> "Instead of instructing on this material issue of fact, the court's jury instructions impliedly assumed its existence. A district court does not have the power to direct a verdict of guilty, and instructions deciding a material fact issue as a matter of law are erroneous because they amount to a partial directed verdict of guilty." (citations omitted) 483 F.2d at 960.

The Trial Court's ruling as a matter of law that Petitioner did, in fact, possess the incriminating evidence constitutes a denial of his Sixth Amendment right to a fair trial by jury. This basic Constitutional right was recognized by the United States Court of Appeals, District of Columbia, in United States v. Hayward, 420 F.2d 142;

> "Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have that jury decide all relevant issues of fact and to weigh the credibility of witnesses." 420 F.2d at 144.

Although the Trial Judge does have discretion to comment on the evidence and to allow the jury to rehear testimony, the court below grossly abused that discretion by depriving the Petitioner of his right to have a jury determine all issues of fact and doing so at a stage of the proceedings which added particular undue influence to those issues.

The Fifth Circuit Court of Appeals, by affirming has sanctioned the actions of the Trial Court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of

supervision as provided in Rule 17(1)(a) of The Revised Rules of The Supreme Court of The United States.

Furthermore, in directly removing the fact issue of possession of incriminating evidence from the province of the jury, the decision below conflicts with the dictates of this Court in Quercia v. United States, supra.

ISSUE II

Schriever was sitting in a motel lobby when approached by two police officials who asked him to accompany them to a certain motel room. He was frisked in route and escorted into a room where several additional police officials were present. The government stipulated that no Miranda warning or other warning had been given to Schriever at this point when he was asked if he knew his co-defendant and if he had any drugs on him. He admitted knowing Williams and emptied his pockets in response to the question regarding drugs on his person. A parking receipt and two writings, one a torn sheet and one a notebook, were taken. A motion to suppress the statement and documents was denied, as were objections to this evidence at trial.

Schriever asserts that the results of this custodial interrogation were improperly admitted contrary to his Sixth Amendment protection against self-incrimination and 18 USC §3501.

The oral admission that he knew Williams clearly falls within the rule of 18 USC §3501 and the protection of the Sixth Amendment. The writings and documents do likewise. They are the fruits of the poisonous tree - the illegal questioning. Secondly, the privilege against self-incrimination extends to the production of personal papers in the owner's possession. See Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886). Thirdly, the emptying of his pockets was a com-

municative act a response to a direct question from police authorities. This court in Schmerber v. California, 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826, recognized that the privilege against self-incrimination,

> "...reaches an accused's communications whatever form they might take, and the compulsion of responses which are also communications..." 384 U.S. at 763, 764; 16 L.Ed.2d at 916; 86 S.Ct. at 1836.

This is especially true here where not only the responses but also the written documents produced were communications by the accused.

The admission of this testimony and evidence directly conflicts with the dictates of this Court in Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) and, therefore, this Court should grant certiorari under Rule 17(1)(c) of the Revised Rules of The Supreme Court of The United States.

ISSUE III

The drug sale and arrest of Schriever's co-defendant took place on the third floor of a motel. When one agent went to move some vehicles he saw Schriever sitting in the motel lobby. After Schriever had been escorted upstairs and undergone his initial questioning discussed in Issue II, he was given a Miranda warning without any notice to him of the nature of the offense of which he was suspected. Agent William Warner, the supervisor of agent Renton, testified that the policy and custom for all agents of the Drug Enforcement Agency was to always inform the suspect of the nature of the offense when giving a Miranda warning.

During the interrogation after this limited warning was given, Schriever stated that he had just had a beer with his co-defendant Williams, an alleged co-conspirator. That admission was one more link in the chain of circumstantial evidence linking Schriever to the conspiracy.

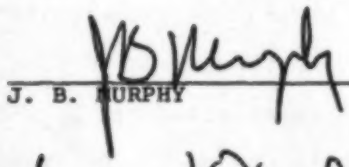
This issue poses an important question of federal law which should be settled by this Court: Whether an accused, prior to custodial interrogation should be informed of the nature of the offense of which he is suspected where such is not readily apparent from the surrounding circumstances such as arrest in flight or at the scene of a crime?

Two district courts of appeal have answered in the affirmative. See Schenk v. Ellsworth, 293 F.Supp. 26 (D.C.

Mont. 1968) and United States v. Ajlouny, 476 F.Supp. 995 (D.C., E.D.N.Y. 1979). Only one appellate court has considered the issue and it also answered in the affirmative, classifying a Miranda warning without notice of the nature of the offense as a warning in a vacuum. See United States v. McCrary, 643 F.2d 323 (5th Cir. 1981).

Because of the importance of this federal question as to the construction of 18 USC §3501 and the significance of an accused's Sixth Amendment privilege against self-incrimination, Petitioner requests this Court to grant certiorari on this issue.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-5941

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS NELSON WILLIAMS,
MICHAEL DELNO SCHRIEVER,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Florida

(July 8, 1981)

Before HILL and VANCE, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.

* District Judge of the Northern
District of Alabama,
sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-5941

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS NELSON WILLIAMS,
MICHAEL DELNO SCHRIEVER,

Defendants-Appellee.

- - - - -

Appeal from the United States District Court for the
Northern District of Florida

- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 8, 5 Cir., 1981, F.2d).

(September 10, 1981)

Before HILL and VANCE, Circuit Judges and LYNNE, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16, Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

18 U. S. C. § 3501

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, whall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether

or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily

by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

CERTIFICATE OF SERVICE

I CERTIFY that I have served a copy of the above Petition for Writ of Certiorari on the Solicitor General, Department of Justice, Washington, D.C. 20530; Thomas Santurri, Esquire, Assistant United States Attorney, 100 North Palafox Street, Pensacola, Florida 32501; and to Michael J. Griffith, Esquire, Attorney for Co-Defendant, P.O. Box 12308, 226 South Palafox Street, Pensacola, Florida 32581, by depositing a copy of same in a mail box with first class postage prepaid addressed to each named person on this 6th day of November, 1981.

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Opposition

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CLERK

Nos. 81-856 and 81-870

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL DELNO SCHRIEVER, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS N. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court's response to a request from the jury concerning undisputed evidence improperly removed from the jury the determination of a factual issue.

2. Whether certain evidence against petitioner Schriever was obtained during an interrogation that violated his *Miranda* rights.

3. Whether the trial court erred in refusing to conduct a separate pretrial hearing to determine if the government could show, by independent evidence, the existence of a conspiracy in which petitioner participated.

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In the Supreme Court of the United States

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Nos. 81-856

MICHAEL DELNO SCHRIEVER, PETITIONER

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (81-856 Pet. App. A-1; 81-870 Pet. App. C-1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1981.[1] A petition for rehearing was denied on September

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[1]This case was decided by Unit B of the United States Court of Appeals for the Fifth Circuit, which on October 1, 1981, became the United States Court of Appeals for the Eleventh Circuit.

10, 1981 (81-856 Pet. App. A-2; 81-870 Pet. App. D-1). The petition for a writ of certiorari in No. 81-856 was filed on November 6, 1981. The petition for a writ of certiorari in No. 81-870 was filed on November 9, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioners were convicted of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846 (Count I). In addition, petitioner Schriever was convicted on one count (Count III), and petitioner Williams on two counts (Counts II and III), of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Schriever was sentenced to concurrent terms of 12 years' imprisonment on each count, and Williams to concurrent terms of 10 years' imprisonment on each count. Each petitioner's term of imprisonment was to be followed by a special parole term of three years. The court of appeals affirmed (81-856 Pet. App. A-1; 81-870 Pet. App. C-1).

The evidence at trial showed that DEA Undercover Agent William Renton met petitioner Williams on June 19, 1980 (Tr. 125). Williams represented himself and an undisclosed partner as large scale cocaine distributors and offered to sell a 10 gram sample of cocaine to Renton (Tr. 125-137). Williams stated also that he would be receiving an 11-pound shipment of cocaine the following week and that he would set aside a kilogram for Renton at a purchase price of $55,000 (Tr. 155-156).

When Renton contacted Williams on June 24, Williams told him he had missed the 11-pound delivery, but that he had another load arriving the following day from which he would sell Renton a kilogram at the same price (Tr. 159-160, 165-173). The next day Williams delivered the cocaine

to Renton at a motel in Destin, Florida. After the transaction, Williams was arrested by federal agents (Tr. 201-206). Petitioner Schriever's fingerprints, as well as those of Williams, were found on two of the plastic bags in which the cocaine was delivered (Tr. 252-253, 422-425, 430-434, 437). Moreover, questioning of Schriever, who was present in the lobby at the motel at the time Williams delivered the cocaine, as well as documentary evidence, established Schriever's participation in the June 25 cocaine transaction (Tr. 320-327, 339, 350-352, 428-429, 799-803, 814-816, 875).

ARGUMENT

The issues raised by the petitioners involve the application of settled law to the particular facts presented and pose no question warranting this Court's review.

1. Petitioner Schriever claims (81-856 Pet. 7-11) that instructions the district court gave to the jury during its deliberations improperly removed from the jury a material issue of fact. This claim is without merit.

During the course of its deliberations, the jury sent the court a note inquiring as to which defendant had possession of an orange notebook as well as of exhibits 21 and 22 (a parking receipt and a scrap of paper with calculations) (Tr. 902). The only evidence bearing on this question was Agent Renton's testimony that petitioner Schriever had turned these documents over to the police at the time of his arrest (Tr. 321-323). Defense counsel objected to the court's providing any answer to the jury's question on the ground that the jurors should have to rely on their own recollections (Tr. 902-903). The court ruled that the jury was entitled to have the information, and inquired how counsel wished to handle the matter (*ibid.*). When the prosecutor suggested giving the jury a note stating that the items came from Schriever, the court inquired whether defense counsel was in agreement as to that fact (Tr. 903). Defense counsel did not dispute the prosecutor's representation. Instead, Schriever's

counsel agreed with the prosecutor that if the jury was to be so informed, the court should advise them in writing rather than orally (Tr. 903-904). Thereafter, the court dictated a note, which Schriever's counsel offered to write himself, advising the jury that "[t]he defendant Schriever had possession of this notebook and exhibits 21 and 22" (Tr. 904).

It is well established that a federal judge is more than a moderator of the proceedings; he may comment on the evidence, elicit additional evidence that he thinks may benefit the jury, and clarify facts previously admitted, provided he makes it clear that all factual matters are ultimately the responsibility of the jury to decide. See *Quercia* v. *United States*, 289 U.S. 466, 469 (1933); *Moore* v. *United States*, 598 F. 2d 439, 442-443 (5th Cir. 1979); *United States* v. *Blevins*, 555 F. 2d 1236, 1240-1241 (5th Cir. 1977); *United States* v. *Davis*, 546 F. 2d 617, 622 (5th Cir. 1977); cf. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95 (1931). Thus, the trial judge acted well within his discretion in responding as he did when the jury requested the court's assistance in recalling certain testimony.

While it might have been more precise, in a technical sense, for the court to state that the agent's testimony showed that petitioner Schriever possessed the items in question, there was no error in the trial court's conduct. Moreover, defense counsel failed to object to the phrasing of the note, although a simple request for rewording would almost certainly have removed the basis for the present contention. Thus, he cannot now complain that the form of the court's response to the jury was improper. It is clear in context that the jury was requesting the court to inform it as to what the testimony at trial had been, and that the court's response merely reflected that evidence and not the court's personal views. Indeed, the court in its closing instructions to the jury clearly emphasized that all factual questions were left to the sole determination of the jury, and that if the

court during trial had intimated any opinion as to the facts, the jury could disregard entirely such intimation (Tr. 880-881). Finally, the evidence was undisputed that petitioner Schriever was in possession of the items at the time of his arrest; defense counsel at no time attempted to refute this fact. Thus, even if the note to the jury constituted error, it did not constitute either plain or harmful error. See, *e.g.*, *United States* v. *Klusman*, 607 F. 2d 1331, 1334-1335 (10th Cir. 1979); *United States* v. *Blevins, supra*, 555 F. 2d at 1240-1241; *United States* v. *Newton*, 434 F. 2d 163, 166 (2d Cir. 1970), cert. denied, 401 U.S. 944 (1971).

2. Petitioner Schriever next contends (81-856 Pet. 12-13) that certain evidence should have been suppressed because it was elicited in an interrogation that violated his *Miranda* rights. The record does not support this claim.

Testimony adduced at the hearing on Schriever's motion to suppress showed that following Williams' arrest in his room at the Hawaii Kai Motel, Investigator James Lowman of the Pensacola Sheriff's Department saw Schriever in the lobby of the motel and recognized Schriever as the subject of an investigation that years earlier had led to Schriever's arrest on drug charges (S.H. 6-7, 13-14).[2] Lowman advised DEA Agent Renton of this fact. Renton also had information indicating that Schriever was involved in drug trafficking in the Pensacola area (S.H. 30). Moreover, following his arrest, Williams had advised Renton that he was an associate of Schriever and that he had rented an adjacent room in the motel for Schriever, who, he claimed, was arriving that night to discuss art business (S.H. 29).

Lowman and Renton returned to the lobby of the motel, identified themselves to Schriever, and inquired if they

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[2] "S.H." refers to the hearing on Schriever's motion to suppress, which was conducted on August 13, 1980.

could ask him a few questions; Schriever replied that he would answer their questions. When Renton asked Schriever to accompany them to a room of the hotel so that they could get out of the lobby, Schriever willingly agreed. In the elevator, en route to the motel room, Renton told Schriever that for his protection he would like to pat Schriever down for weapons; the pat-down revealed no weapons (S.H. 31).

Upon entering the motel room, Renton immediately advised Schriever of his *Miranda* rights, and Schriever stated that he understood those rights. Schriever inquired whether he was under arrest, and was told that he was not. Renton then asked Schriever if he knew Williams. Schriever said that he did and that he had just had a beer with Williams in the lounge of the motel. When asked if he was aware that Williams had just delivered a kilogram of cocaine to Renton, Schriever replied he had no knowledge of any drugs, and denied being involved in the sale. Renton then asked Schriever whether he had any cocaine on his person. Schriever stated he did not and immediately began emptying his pockets, throwing everything onto the table. Included among these items were a notebook and sheets of paper that linked Schriever to the instant drug deal. Schriever was then arrested (S.H. 31, 37, 40).

The record thus makes clear that Schriever was advised of his *Miranda* rights before he made the statement linking him to Williams, and before the discovery of the documents in his possession.[3] The evidence further shows that

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[3]Petitioner claims (81-856 Pet. 12) that the government stipulated at trial that Schriever had not been advised of his *Miranda* rights at the time he was asked whether he knew Williams and whether he was carrying any drugs. However, the record establishes that the government stipulated only that Schriever was not advised of his *Miranda*

Schriever voluntarily emptied his pockets in an attempt to exonerate himself by showing that he was not carrying drugs. Indeed, in denying Schriever's suppression motion, the district court explicitly credited the agents' testimony that Schriever had voluntarily emptied his pockets, finding that Schriever's testimony to the contrary was "not credible" (S.H. 59-60).

3. Petitioner Williams claims (81-870 Pet. 6-8) that the trial court erred in failing to conduct a separate pretrial hearing to determine whether the government's evidence established the existence of a conspiracy in which petitioner participated. He contends also that the court erred in refusing to allow him to testify at such a hearing (81-876 Pet. 4-6).

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rights prior to entering the motel room (Tr. 299-302, 304-305, 313, 318).

Relying on *United States* v. *McCrary*, 643 F. 2d 323 (5th Cir. 1981), *United States* v. *Ajlouny*, 476 F. Supp. 995 (E.D. N.Y. 1979), aff'd 629 F. 2d 830 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981), and *Schenk* v. *Ellsworth*, 293 F. Supp. 26 (D. Mont. 1968), Schriever also contends (81-856 Pet. 14-15) that prior to custodial interrogation a suspect must be informed of the nature of the offense of which he is suspected. However, those cases, like 18 U.S.C. 3501(b), upon which petitioner also relies, merely stand for the proposition that the defendant's knowledge of the charges is one factor to be considered in assessing the voluntariness of a confession.

The facts show that Schriever was not "in custody" at the time he admitted to the agents that he knew Williams; rather, the agents had requested and received Schriever's consent to question him. Schriever cannot claim that he was unaware of the offense upon which the questioning was based, since that questioning occurred within minutes of the drug transaction and only after Agent Renton identified himself to Schriever as a drug enforcement agent. Finally, the only portion of the questioning which revealed clearly incriminating evidence—namely, petitioner's emptying of his pocket in response to the agent's inquiry whether he was carrying drugs—occurred *after* petitioner was apprised of the precise nature of the investigation and *after* he was advised of his *Miranda* rights.

Immediately prior to trial, the court held a conference on petitioners' motions for a pretrial hearing pursuant to *United States* v. *James*, 590 F. 2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979). (Tr. 59-64, 84-91). The court denied the motions, explaining that such a pretrial hearing was not required by *James* (Tr. 59-60; 63-64). Rather, the court followed the procedure of disallowing any co-conspirator statements until the government had established, by substantial independent evidence, the existence of a conspiracy and petitioner's participation therein (Tr. 60-62).

Accordingly, the government at trial first introduced independent evidence of the conspiracy. Thereafter, the court ruled that the government had established the conspiracy by substantial independent evidence and that co-conspirator statements could be admitted into evidence (Tr. 471-473, 477).[4] Again, at the close of all the evidence the court, as required by *United States* v. *James, supra*, ruled that the government had established the conspiracy by a preponderance of the evidence, independent of any co-conspirator statement (Tr. 834-835). Petitioner does not challenge this finding; he merely contends that it should have been made at a separate hearing.[5]

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[4]Petitioner's contention that this procedure conflicts with *United States* v. *Petrozziello*, 548 F. 2d 20 (1st Cir. 1977) is groundless. The procedure followed below is precisely the course the court praised in *Petrozziello*, as the full footnote in *Petrozziello*—from which petitioner quotes only a portion (81-870 Pet. 7)—clearly shows. 548 F. 2d at 23 n.3.

[5]Petitioner Williams relies on *United States* v. *Grassi*, 616 F. 2d 1295, 1300 (5th Cir. 1980), for the proposition that a pretrial hearing to determine the admissibility of co-conspirator declarations is required by *United States* v. *James, supra*. While the *Grassi* court did state in dictum that *James* mandated such a pretrial hearing, the Fifth Circuit subsequently has made clear that such a hearing is not required. See *United States* v. *Ricks*, 639 F. 2d 1305, 1309-1310 (5th Cir. 1981); *United States* v. *Ocanas*, 628 F. 2d 353, 359-360 (5th Cir. 1980).

The record demonstrates that the court carefully followed the procedures recommended in *James* for admission of co-conspirator statements. And, despite petitioner Williams' assertions to the contrary (81-870 Pet. 6-8), no co-conspirator statements were admitted into evidence until the court ruled that the conspiracy had been established by substantial, independent evidence. Moreover, since there is no basis for disputing the existence of sufficient independent evidence to justify admission of co-conspirator declarations, any procedural irregularity in reaching a correct conclusion on admissibility is patently harmless.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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